Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Promotion of Competitive Networks in Local Telecommunications	WT Docket No. 99-217
Wireless Communications Association International, Inc. Petition for Rulemaking To Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	
Cellular Telecommunications Industry Association Petition for Rulemaking and Amendment of the Commission's Rules To Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes And Assessments	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	CC Docket No. 96-98

JOINT COMMENTS OF
BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL
INSTITUTE OF REAL ESTATE MANAGEMENT
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
MANUFACTURED HOUSING INSTITUTE
NATIONAL APARTMENT ASSOCIATION
NATIONAL ASSOCIATION OF HOME BUILDERS
NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS
NATIONAL ASSOCIATION OF REALTORS
NATIONAL MULTI HOUSING COUNCIL AND
NATIONAL REALTY COMMITTEE/THE REAL ESTATE ROUNDTABLE

(THE "REAL ACCESS ALLIANCE")

SUMMARY

The Real Access Alliance respectfully submits these comments to the Commission. The Alliance asks the Commission to reject efforts to force private property owners to permit telecommunications providers to place their equipment on or inside buildings without the consent of the owner.

Introduction.

The Real Access Alliance represents the entire commercial and residential real estate industry. We speak for the developers, builders, managers, and financiers of the real estate sector of the national economy: they are a cornerstone of the U.S. economy, producing 12% of the nation's GDP, and employing nearly nine million Americans. We stand together to ask the Commission to reject all proposals to extend regulation to our industry in the name of deregulating the telecommunications industry.

Regulation is wholly inappropriate because the real estate industry is competitive and adapts daily to market-place price signals and customer demand. In 1996, the Federal Trade Commission found the real estate sector was sufficiently dispersed in ownership that no entity exercised enough market power to warrant pre-merger notification of federal antitrust authorities. In fact, no single entity controls more than five percent of the real estate industry's assets. This stands in stark contrast to other major sectors of the economy, including telecommunications.

Computing power, networking technology and smart buildings are revolutionizing the way office space, shopping centers and apartment buildings are being designed, managed and operated today. These changes in technology — along with other major political and economic developments — add up to enormous opportunities and challenges for our industry as well as for telecommunications providers.

Our industry welcomes the focus on consumer choice that telecommunications companies bring to the market. It parallels our own interest in giving tenants what they want and

need in the way of new telecommunications services. Tenants today demand the most advanced technologies for data and messaging capabilities at the most affordable cost — needs that the real estate industry is working hard to meet.

The Real Estate Alliance Opposes Forced Access.

The real estate industry supports reasonable policies to advance competition in telecommunications. The real estate industry benefits from telecommunications competition. We want it to expand as quickly as the markets will allow. Cheaper, better telecommunications service will improve the services available to our building occupants, the health of our occupants' businesses, and the health of the economy in general. In our view, however, the current proposal to mandate forced access to private property for a privileged group of telecommunications companies is unnecessary, inappropriate, and unconstitutional.

There are no significant market failures in real estate that prevent telecommunications competitors from reaching tenants. The only issue is the speed of network build-out by competitive telecommunications providers. These networks are expensive to build and may be economically viable only in highly concentrated business-core regions. To expand these networks more broadly and more expeditiously may require some form of additional subsidy to reduce the relative costs of the networks. Any effort to find a source of subsidy for expediting network construction, however, should not be confused with allegations that forced building access is justified by the behavior of the real estate industry. There is, in fact, no evidence that building access is affecting the rate of competitive telecommunications network expansion. The evidence instead indicates that demand by building owners and their tenants for service by competitors is outstripping the competitors' ability to provide the service. The competitive telecommunications companies are growing as fast as they can under current economic conditions and present building access policies are not slowing growth in telecommunications competition.

The proposals before the Commission, however, will distort the existing free market forces that shape capital investment in real estate ventures. Tenants and occupants want buildings that offer modern facilities and services, including choice in telecommunications providers. Building owners who ignore this demand will lose occupants to competing buildings. The proposals before the Commission will distort the market forces that discipline owners and building managers to act in the best interests of their occupants.

"Forced access" is industrial policy in search of a source of subsidies to fund selected telecommunications companies. It is rhetoric of false alarms and misleading anecdotes in search of non-existent problems. If the Commission believes telecommunications providers need a subsidy to expand competitive networks, the Constitution requires the cost of the subsidy to be fairly distributed across the entire society, not arbitrarily assigned to the owners of real estate.

Our conclusions are built on a mass of evidence including four separate studies that are attached to our comments:

*1. **Survey of Competitive Availability.***

The Alliance commissioned a survey of the world of available telecommunications competition as it exists for building owners today. This survey demonstrates convincingly that the Notice of Proposed Rulemaking ("NPRM") is based on false assumptions about the market place and that the claims of the proponents of the proposed rules have no basis in fact. The survey is a statistically valid, random sampling of building owners and managers, which shows that:

- Two-thirds of all requests for access by telecommunications providers have resulted either in an agreement or pending negotiations.
- Specialized telecommunications access agreements do not take substantially longer to negotiate than ordinary tenant leases.
- 82% of building owners and managers cite tenant-related reasons (choice, satisfaction, retention) as their primary motivation for offering competitive telecommunications services.

- The allegations and anecdotes of unreasonable behavior by building owners are not representative.

2. *Economic Policies Appropriate for Telecommunications Access to Private Property.*

We also provide an expert economic analysis of the NPRM's proposals and the evidence of the forces of competition adequately addressing building access.

The economic analysis discusses the economic theory of market failures that warrant regulatory intervention, and finds that the real estate industry is competitively-structured, with very low levels of economic concentration, and that there is no evidence of market failure. Economic theory teaches that market prices and voluntary negotiations are the most efficient and responsive mechanisms for accelerating delivery of competitive telecommunications services to building occupants. Regulatory intervention would interfere with these market forces, which discipline building owners and managers to act rationally and in the best interests of their occupants, and would stifle innovation and creativity in the marketplace.

The economic analysis finds that Commission intervention is unwarranted because local telecommunications competition is thriving. In addition, the proposals in the NPRM are ultimately unworkable because of the large number of properties and the complexity of the relationships involved. The analysis also observes that if the Commission were to compel building owners to supply access to buildings on terms and conditions below those at which they would otherwise be voluntarily willing to make such access available, they would then be compelled to effectively subsidize the business activities of others, such as competitive telecommunications providers. The current proposal before the Commission is therefore a request for a hidden subsidy in the form of below-market prices for access to capital investment, masquerading as consumer protection regulation.

3. *Legal Analysis of the Relationship between Building Owners and Telecommunications Facility Providers on the Premises.*

Attached to our comments is a description and analysis of the real property concepts underlying the access and use rights of telecommunications providers. This analysis is offered as an aid to the Commission as it looks at questions outside its area of expertise. We believe the Commission needs first to understand the legal history of existing property and contractual rights before addressing proposals that would radically change those rights and interests.

Most telecommunications facility providers currently enter our buildings as invitees. State property law governs the relationship. The providers typically hold a limited privilege to occupy the physical space. Seldom does their interest inside a building rise to the level of an easement. It is best characterized as a "license coupled with an interest," which gives the provider the right to occupy the building with its facilities and protects the provider's property rights in those facilities by limiting the owner's ability to revoke the license. These rights cannot be readily expanded under state law.

4. *Constitutional Analysis of Private Property Rights and Forced Access.*

Our comments also attach a review of the constitutional restraints on the Commission's ability to regulate the owners of private property. The Fifth Amendment to the United States Constitution requires the federal government to pay the entire value of any private property that is confiscated for a governmental purpose. The Supreme Court leaves no ambiguity on this point. If the federal government wants the property, it can take it—but it has to pay full value. The societal consensus that underpins the "takings" obligations of the government is simple. The burden of governmental actions should be shared equitably by all, not imposed unfairly on a few. The constitutional analysis attached to our comments concludes that no matter how the Commission might try to structure it, any forced access proposal would effect a taking of private property and impose massive liability on the federal treasury.

The Commission has no explicit statutory authority to mandate a taking of private property. And the courts are clear. Takings authority must be explicit and is narrowly construed. There is no evidence of Congressional intent to grant the Commission authority to condemn private property and to dedicate that property to the privileged use of telecommunications companies. There is no budget authority or appropriations authority to fund any takings the Commission does order.

The Commission should avoid this "takings" quagmire. The financial risks to the real estate industry and to the general taxpayer are enormous. Current surveys reflect that property access rights are just beginning to generate noticeable revenues for building owners—about $.12/square foot of office rental space per year. But there is 10 billion square feet of office rental space in the United States. As building access enhances the values of telecommunications companies, this number is certain to grow. A direct or inverse condemnation of this growing value would generate large yearly liabilities to the United States Treasury.

Responses to NPRM Questions.

Based on the studies we have undertaken, the following summarizes the Real Access Alliance's position with respect to the main points raised in the NPRM:

- **The Commission cannot expand access rights under Section 224 of the Communications Act.** Section 224 was never intended to apply to facilities located inside buildings, and has never been interpreted that way. Building owners are not "utilities" within the meaning of Section 224. Wire-holding structures inside a building are part of the building and therefore owned and controlled by the building owner and not whatever utility happens to occupy them. The access rights held by telecommunications providers are typically licenses, and therefore not "rights-of-way" as the term is used in Section 224. Furthermore, even if Section 224 applied to access rights inside buildings, their scope is defined by state property law and the Commission cannot expand them without effecting a taking under the Fifth Amendment.

- **Access to Unbundled Network Elements must respect property rights.** The Real Access Alliance does not dispute the Commission's authority to order telecommunications carriers to make available to competitors wiring that they own that is located inside buildings. Such a ruling cannot be construed to include a right of physical access to a building, however, without effecting a taking.

- **The Commission cannot order nondiscriminatory access to facilities controlled by the building owner.** The Commission has no jurisdiction over building owners and cannot order them to do anything. Even if the Commission had jurisdiction, any attempt to impose a nondiscrimination obligation on building owners that purported to grant a right of access would violate the Fifth Amendment, either as a per se taking or a regulatory taking.

- **Exclusive contracts should be permitted.** Exclusive contracts can enhance competition because they are often the only economically viable means of delivering new services to consumers, especially for new providers facing entrenched incumbents.

- **The Commission's definition of the demarcation point should preserve flexibility and property rights.** All property owners should have the right to establish the demarcation point at a place of their choosing if a carrier does not establish it at the minimum point of entry.

- **The cable home wiring rules should not be extended unless the Commission re-examines existing arrangements between building owners and incumbent local exchange carriers.** The cable rules only apply when the incumbent provider no longer has a legally enforceable right to remain on the premises. Merely extending the rules to telephone wiring may not be very useful, because the ability of property owners to terminate an ILEC's access rights is often limited or unclear.

- **The Commission should not expand the scope of the OTARD rules.** In extending the OTARD rules to leased property the Commission has already exceeded its authority and violated the Fifth Amendment; further extending the rules to include new services would compound the error.

Conclusion.

Forced access would alter the fundamental principles underlying the law and business of real estate markets in the United States. This is an odd and infrequent adventure by a federal regulatory agency.

A better approach is for the Commission to address directly the true nature of the problem faced by the Commission in extending telecommunications competition. The essence of this proceeding is the question of subsidies. Competition is not being retarded by lack of access to office and residential buildings. The question is whether competitive telecommunications companies need subsidies to compete? If so, how much and how should they be funded? Forced access proposals implicitly assume that the market alone will not sustain competitive network

facilities. Does the Commission believe that competitive providers cannot pay the full value of the resources they consume as they create competitive networks? If so, the Commission may favor an industrial policy of accelerated telecommunications infrastructure development. But this policy preference does not give the Commission the authority to grant implicit subsidies to favored telecommunications operators. Even more, it does not authorize unconstitutional transfers of private property values from building owners to favored telecommunications companies.

If the Commission adopts the approach proposed in the NPRM, the general taxpayer will have to pick up the financial tab. Neither Congress nor the courts are likely to favor a policy that could impose an unbudgeted and unpredictable financial liability to the tune of billions of dollars on the taxpaying public.

The Real Access Alliance urges the Commission to act decisively and reject the pending proposal. The Commission should allow the capital markets — both in real estate and in telecommunications — to work without regulatory interference in this area. Forced access to private property for the benefit of a few companies will distort the current, effective forces of real estate competition that encourage building access by competitive providers.

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(THE "REAL ACCESS ALLIANCE")

INTRODUCTION

The Real Access Alliance[1] submits these Comments in response to the Commission's Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98 (released July 7, 1998) (the "NPRM"). The Real Access Alliance urges the Commission to abandon any attempt to grant telecommunications providers the right to enter private property or to place their facilities inside buildings without the consent of the owner. This includes any attempt to require access on allegedly "nondiscriminatory" terms. As several members of the Commission have already noted, the lawfulness, including the constitutionality, of many of the proposals in the NPRM is highly questionable.[2] Furthermore, as we will show, the Commission's goals will not be met, and in fact would be hindered by the proposed regulations.

The Real Access Alliance finds it remarkable that the Telecommunications Act of 1996 (the "1996 Act"), a historic attempt to deregulate the traditionally highly regulated telecommunications industry and replace historical monopolies with competitive markets, is

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[1] The members of the Real Access Alliance are: the Building Owners and Managers Association International, the Institute of Real Estate Management, the International Council of Shopping Centers, the Manufactured Housing Institute, the National Apartment Association, the National Association of Home Builders, the National Association of Industrial and Office Properties, the National Association of Realtors, the National Association of Real Estate Investment Trusts, the National Multi-Housing Council, and the National Realty Committee. The members are further described in Exhibit A.

[2] *See* NPRM, Separate Statements of Commissioners Ness, Furchtgott-Roth, and Powell. In addition, we note that the Commission has already developed a substantial factual record and been presented with detailed legal analyses of the issues raised by the NPRM in several other proceedings, all of which establish that that the Commission has no authority to adopt any of the proposals suggested in the NPRM that purport to impose obligations on building owners, or take their property. *See* Exhibit B for a list of proceedings and relevant comments filed by the members of the Real Access Alliance.

being used to justify anticompetitive regulation of an entirely different industry. Congress neither intended nor foresaw this result.[3]

For these reasons, we strongly believe that this proceeding is unnecessary and should be terminated without the adoption of new rules. The record in this proceeding will demonstrate that regulation would be unwise and counterproductive; to assist the Commission in recognizing this, the Real Access Alliance has compiled a mass of evidence, including the following:

- Competitive Access Survey. Charlton Research Company conducted a survey of building owners on behalf of the Alliance between July 26 and August 4, 1999 ("the "Charlton Survey"). With a sample size of 316, the margin of error of the survey is +\- 5.5%. The objectives of the study were to assess the level of access granted to competitive telecommunications providers by building owners; gauge the length of time it takes to negotiate leases with providers; and determine the primary motivation of owners and managers in making competitive telecommunications services available to their tenants. The Charlton Survey found that property owners normally grant requests for access, primarily because they wish to respond to the needs of their tenants. Access is granted in a timely manner, although negotiations may take somewhat longer than normal lease negotiations. A copy of the survey report is attached as Exhibit C.
- Economic Analysis of the Forced Access Proposals. Strategic Policy Research, Inc. has analyzed the proposals in the NPRM from an economic standpoint and prepared a

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[3] Public policy has long recognized free and open competition as the principal and preferred means of regulating the nation's economy. *See generally, Otter Tail Power Company v. United States*, 410 U.S. 372, 374 (1973); *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51 (1963); *California v. Federal Power Commission*, 369 U.S. 482, 489 (1962); *United States v. Radio Corporation of America*, 358 U.S. 334 (1959).

report, which is attached as Exhibit D (the "SPRI Study"). The SPRI Study concludes that real estate is a competitive market and demonstrates none of the normal signs of an industry with market failures. The study finds that local competition is thriving. Forced access would therefore constitute unwarranted public-utility style regulation of a competitive market. In addition, the proposals pending before the Commission are ultimately unworkable because of the large number of properties and the complexity of the relationships involved.

- Fifth Amendment Takings Clause Analysis. The law firm of Cooper, Carvin & Rosenthal examined the Constitutionality of the forced access proposals under the Takings Clause of the Fifth Amendment (the "Cooper, Carvin Analysis"). This analysis concludes that no matter how the Commission might try to structure it, any forced access proposal would effect a taking of private property and impose massive liability on the federal treasury. The Cooper, Carvin Analysis is attached as Exhibit E.
- Real Property Access Use Rights Analysis. Charles A. Hansen, a professor at Boalt Hall Law School (U.C.-Berkeley) and Andrew N. Jacobson of the Minneapolis law firm of Maslon Edelman Borman & Brand, L.L.P., have prepared a description of the basic principles of real property law governing the use and access of property by telecommunications providers and utilities (the "Property Law Study"). The Property Law Study, which is attached as Exhibit F, defines various types of rights to use and occupy real property, discusses the nature of the access rights in buildings typically held by telecommunications providers. The Property Law Study demonstrates the complexity of this field, which is governed by state law, and finds that incumbent

telecommunications providers typically occupy buildings under various forms of licenses.

- Declarations of Property Owners and Managers. Representatives of various firms representing different portions of the real estate industry have submitted declarations regarding their policies and experiences in dealing with telecommunications access issues. These declarations are attached as Exhibits G-L, O and P.
- News Articles on Developments in the Real Estate Industry. A collection of relevant articles is attached as Exhibit M.

I. COMMISSION ACTION IS NOT NECESSARY BECAUSE THE MARKET IS WORKING.

The real estate and telecommunications industries present a stark contrast. The real estate industry consists of thousands and thousands of businesses of every size, some operating only in a single small community, others national and international in scope. On the other hand, the telecommunications industry remains dominated by large regulated utilities. Congress and the Commission have set out to infuse the telecommunications industry with the competition and innovation characteristic of the real estate industry.[4] The Alliance welcomes this change because it will benefit property owners, tenants and our entire society.

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[4] The purpose of the 1996 Act was "to promote competition and reduce regulation." Upon introducing the floor debate on S. 652, which became the 1996 Act, Senator Pressler stated:

> History teaches us that, under existing law, the FCC and the courts have not been able to respond to market and technology changes in an expeditious manner. This delay prevents the consumer from gaining the benefits of competition, such as lower rates, better services, and deployment of new and better technologies.
>
> The courts, FCC and Justice Department have been micro-managing the growth of competition in the

The Commission should let this process unfold naturally, without extending regulation to currently unregulated enterprises. The real estate industry has compelling market incentives to meet tenant demands for better and more competitive telecommunications services, and it is responding to that demand. Furthermore, any Commission attempt to regulate real estate investors will be counterproductive. The real estate industry functions in a competitive market, fully responsive to consumer demand and the wider society's economic environment. Regulation should only be used as a substitute for failed market forces in those few instances in which the market does not function. Real estate and telecommunications access to private property is not such a case, and Commission intervention would only distort the current and effective free market forces without justification in economics, law or policy.

A. The Real Estate Industry Is Competitive, Dynamic and Responsive to Tenant Demands.

Few industries are as competitive or entrepreneurial as real estate. The key inputs are land and capital, both readily available in today's marketplace. Other skills are needed to transform those inputs into valuable properties, but the relative ease of entry means that established players are always looking over their shoulders – or across the street – to see what the competition is doing. This ease of entry also means that there are literally thousands of small property owners and managers all across the country. The existence of so many competitors of all sizes, scattered throughout every community, makes the industry a model of free market economics. *See* SPRI Study at 2-4.

> telecommunications industry. That is why the committee believes [new legislation is needed].

Statement of Sen. Pressler, 141 Cong. Rec. 57885 (June 7, 1996) (daily ed.). If the Commission adopts forced access it will not only be micromanaging the telecommunications industry, but the real estate industry as well. It will certainly not be promoting competition.

The federal government has already recognized the high level of competition in the real estate industry. In 1996, the Federal Trade Commission modified its premerger notification rules to exempt the real estate industry. *Premerger Notification, Reporting and Waiting Period Requirements*, 61 Fed. Reg. 13666, 13674 (March 28, 1996). The FTC concluded that the real estate industry was sufficiently competitive that no single entity is likely to have enough market concentration to trigger antitrust concerns. This conclusion is borne out by figures discussed in the SPRI Study. For example, the largest building owner/management firm in the country only controls 5.5% of all the office space in the country. SPRI Study at 4. The residential marketplace is even less concentrated. Furthermore, owners of rental property compete not only with each other, but also with all the businesses and public sector entities that own their own buildings and have the option of expanding existing buildings or constructing new ones.

This lack of market concentration means that real estate developers are true "price takers." They must respond to the demand of building occupants and cannot shape that demand or price property developments independently of consumer preferences. Tenants and building occupants have real alternatives to a landlord or developer that does not respond to the tenant's requirements. First of all, the range of properties available to potential tenants is enormous. Not only is the industry diversified by type of property: office, apartment, shopping center, industrial park and so on, but there is a great variety of different buildings in each geographic area and within each category. For example, there are 1,397 buildings in downtown Manhattan alone. SPRI Study at 3. This means that prospective tenants have meaningful alternatives, if a building owner is unable or unwilling to meet their needs, whether it be for more space, cheaper space, telecommunications service, or anything else. In economic terms, buildings are a substitutable

commodity, and demand for space in any one building is likely to be highly elastic. SPRI Study at 3-4.

Second, tenants are not tied down. If the building owner refuses a tenant's request for specific services, such as access to multiple telecommunications providers, the tenant can leave -- in real time. Market forces keep lease terms short. The typical residential lease is for one year only, and 33% of renters move every year; in some areas, such as Florida, the annual turnover rate is easily 60% per apartment property owner.[5] Most developers assume a 50% turnover rate when computing pro-forma financial statements. This is obviously a highly fluid marketplace, and building owners must respond to consumer preferences or face unoccupied space. Similarly, the average office lease term is approximately three to five years, and businesses move frequently as they grow. While not as high as in the apartment market, the average annual turnover rate in office buildings is substantial. This means that new tenants — with new demands — are coming into buildings constantly. The market is not static, but dynamic, and owners cannot ignore their tenants, new technological developments, or changes in the market just because they have signed leases with existing tenants.

Third, office tenants make their needs for telecommunications services very clear, not only in initial lease negotiations, but during the lease term. Building owners have strong incentives to avoid turnover in their buildings, and have no incentive to keep a tenant's preferred telecommunications provider out of the building, so long as safety, aesthetic and liability concerns are met.[6] Unreasonable owners can count on losing tenants.

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[5] *See* Statement of Lyn C. Lansdale ("Lansdale Statement") attached as Exhibit O.

[6] For a discussion of the kinds of concerns addressed in both negotiations for telecommunications access and general lease negotiations with tenants, *see* the Declaration of Richard Stern attached as Exhibit G (the "Stern Declaration").

The Commission itself has recognized in parallel proceedings that building owners have strong incentives to meet their tenants' demands for telecommunications services. *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability,* Report, CC Docket No. 98-146, 14 FCC Rcd. 2398 (rel. Feb. 2, 1999), at ¶ 103; *Telecommunications Services – Inside Wiring,* CS Docket No. 95-184 and MM Docket No 92-260, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 2659, 10 Comm. Reg. (P&F) 193 (1997), at ¶ 178. In fact, tenants are remarkably well-satisfied with the telecommunications services provided by their buildings. BOMA and the Urban Land Institute conducted a survey of office tenants in 1999, which indicated that 89% of office tenants are satisfied with the telecommunications services available to them. *See What Office Tenants Want,* 1999 BOMA/ULI Office Tenant Survey Report ("ULI Survey"), at p. 43.[7]

Some may argue that building owners have a financial incentive to deny tenants services they want. This is not the case. Ancillary revenue from telecommunications providers is not substantial enough for building owners to put tenant rent revenues at risk. The base access charge reported by a national site management firm responsible for over 12,000 buildings averages only $300-$500 per month. *See* Stern Declaration at ¶ 10. Similarly, average annual rent for office space is currently about $19.29 a square foot, nationwide — but revenue from telecommunications providers (including not just CLECs but cellular and PCS antenna leases and other sources) averages only $0.12 per square foot per year. BOMA International, *Experience Exchange Report* (1999) at 16, 25. This is 0.6% of a building's total income. *Id.*

[7] In the ULI Survey, tenants were asked to identify technology features that they needed but were not available in their building. Only 11% identified any such features: the most common ones were telecommunications capability, wiring for Internet access and high-speed networks, advanced HVAC systems, security systems and redundant power supplies.

No rational property owner would jeopardize $19.29 to earn $0.12. There is no marketplace evidence that building owners have any incentive whatsoever to keep service providers off their properties. All of the economic incentives work in the other direction -- building owners want and welcome new telecommunications services that can address the requests of their tenants.[8]

Thus, there is powerful evidence that building owners continually respond to tenant requirements, and Commission policy must recognize this fundamental fact.

B. Building Owners Are Giving Competitive Providers Access to Their Properties.

The NPRM is based on the false premise that CLECs are unable to obtain access to properties. There is overwhelming evidence that building owners in fact allow competitive providers into their buildings. Not surprisingly, building owners do so because they want to satisfy their tenants.

The Charlton Survey demonstrates that lack of access is not a problem. The Survey notes the following points:

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[8] Ironically, until very recently, federal tax policy has deterred property owners from entering into agreements with telecommunications providers. Under the Internal Revenue Code, a real estate investment trust ("REIT") property owner must earn most of its income from real estate rents. Any income it derives from providing customary services to its tenants is considered part of the qualifying real estate rents. However, if the REIT provides "non-customary" services to a tenant, not only is the income from the service not qualifying, but also the underlying rents are "tainted" and therefore not considered as "good rents" for the REIT tax tests. IRS rules thus have prevented REITs from receiving any payment associated with "non-customary" services, even if the payments were intended simply to cover the additional costs arising from the presence of an additional provider on a property. The IRS has been slow in acknowledging that the real estate market has evolved to the customer-oriented business it has become. Only in January of this year did two office REITs get private letter rulings from the IRS in which it concluded that fees the REITs received from partners that provide high speed internet and other telecom services to the REIT's tenants were qualifying income. Before that, REITs by and large did not sign access agreements because of the possibility that they would be de-REITed, even if they did not receive any fees from their joint venture partners. The IRS has yet to issue any private letter rulings allowing apartment REITs to enter into similar arrangements, although several apartment REITs are now doing so based on the office REIT private letter rulings.

- Over 65% of the time, building access is successfully negotiated, or negotiations are still in progress.

- 13% of building owners report having requested service from a competitive provider and being turned down.

- Respondents have been contacted by a total of 134 providers; of these, 104 (or 78%) were granted access.

- Over half the respondents have never denied access to a provider; only 37% have denied access, many on only a single occasion.

- Respondents gave the following reasons for denying access:[9]

  - Breakdown in negotiations: 33%
  - Provider problem: 21%
  - Space and security issues: 19%
  - No tenant demand: 15%

- 82% of respondents gave as their primary reason for granting access either tenant interest, or the desire to keep the building competitive. Only 9% cited revenue as their primary reason.

- Specialized telecommunications access agreements take an average of less than five months to negotiate, compared to three months for ordinary tenant leases.

We invite the Commission to examine all the survey results carefully: They show that building owners are treating competitive providers fairly and reasonably.[10] Owners rarely turn providers away, and when they do it is for sound business reasons.

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[9] This is real evidence that when access is denied it is for a valid reason. Even assuming that negotiations broke down because the owner was unreasonable in half the cases where that factor was cited, over 70% of the time access was denied for entirely sound business reasons relating to the building, the provider, or demand for the service.

[10] The National MultiHousing Council recently conducted an informal survey of its members, inquiring about their experience and policies in allowing competitive telecommunications providers access to their buildings. The respondents represented over 3600 buildings and nearly 860,000 apartment units in 48 states plus the District of Columbia. Every company has entered into agreements with at least one competing provider.

The Charlton Survey is by no means the only evidence that the alleged problem does not exist. The CLECs themselves routinely trumpet their success in executing agreements with property owners. The following list refers to just a few of the many recent press releases on this topic:[11]

- On August 13, 1999, Advanced Radio Telecom Corp. announced completion of an agreement to serve 420 buildings in 11 states managed by DEVNET, L.L.C.
- On August 11, 1999, Telegent announced that it had raised its year-end target for securing access rights by 20% from 5000 to 6000 buildings.
- On July 8, 1999, WinStar announced that it had set a new company record for access rights in new buildings. WinStar now has access rights for over 5500 buildings, having added more than 700 in the second quarter of 1999. The company also announced that it expected to have the right to serve 8000 buildings by year end.
- In the first quarter of 1999, WinStar's penetration in networked buildings increased to an average of 14%, above the company's long-term goal of 10%. *Communications Daily,* May 13, 1998, p. 10.
- On May 11, 1999, WinStar announced a deal to serve 11 buildings owned by Great Lakes REIT, with an option for 20 more. The press release stated that WinStar's service will allow Great Lakes "to differentiate [their] properties from their competition."
- WinStar has entered into an agreement to provide broadband, voice, data, and Internet services in 90 buildings owned by Equity Office Properties Trust. These buildings are located in Atlanta, Boston, Chicago, Dallas, Denver, Los Angeles, Philadelphia, and Seattle. *Communications Daily,* Apr. 7, 1999, p. 8.
- On January 5, 1999, WinStar announced that it has obtained access rights to more than 4200 commercial buildings nationwide, exceeding its 1998 goal.
- WinStar and Spieker Properties have negotiated an agreement that gives WinStar access to over 600 office buildings in Los Angeles, the Bay Area, and Seattle. *Telecommunications Reports,* Dec. 21, 1998, p. 28.

[11] These and other press releases are attached as Exhibit N.

In addition, at a recent Congressional hearing on forced access, the representative of the CLEC industry on the panel was asked whether his company had ever been denied access to customers in MDU's that wanted his company's services. He replied "Rarely ...."[12]

Furthermore, there is no question that the CLEC industry is growing, and growing fast. If the industry were not able to obtain access to buildings, it would not be able to grow.[13] The Commission's own figures illustrate the industry's enormous growth rate. For example, Table 8.14 of the Common Carrier Bureau's report, *1997 Statistics of Communications Common Carriers*, shows that total CLEC revenue in 1992 was only $69 million, but by 1997 it had grown exponentially to $1.9 billion. This represents an increase of nearly *2700 percent* in only five years. Similarly, the Common Carrier Bureau reports that between 1993 and 1997, the number of miles of fiber optic cable installed by CLECs has grown from 200,000 to 1.8 million. *Trends in Telephone Service*, Industry Analysis Division, Common Carrier Division, Federal Communications Commission (February 1999) Chart 9.1. Anybody who has walked the streets of Washington, D.C. in the last three years will have seen the proliferation of street cuts criss-crossing the city as CLECs and others install fiber optic capacity —if building owners were not permitting providers to enter their buildings, none of this construction would occur. One analyst predicts that by the year 2004, total CLEC revenue will reach $40.5 billion, representing 25% of local exchange revenues. *State Telephone Regulation Reports*, July 23, 1999 at p. 9.

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[12] *Access to Buildings and Facilities by Telecommunications Providers*, Hearing before the Subcommittee on Telecommunications, Trade, and Consumer Protection, 106th Cong. 2d Sess. (May 13, 1999) Serial No. 106-22, at p. 74 (*"House Hearing Transcript"*).

[13] The SPRI Study notes that the CLEC industry seems to have ample access to the capital markets; if investors perceived that the industry favored serious difficulties in expanding its networks, this would not likely be the case.

Individual property owners also report that they willingly allow competitive providers onto their properties. To supplement the data captured in the Charlton Survey, we have obtained declarations from several real estate professionals, demonstrating that real estate companies typically allow access to CLECs:

- Vector Property Services is a small management company, operating three buildings in Denver and Dallas. Vector has never denied access to any telecommunications provider and is seeking providers to serve its buildings. In July 1999, Vector signed four agreements for three buildings. Declaration of Dennis Greene, attached as Exhibit H.

- Charles E. Smith Commercial Realty LP is a large property owner and manager, controlling over 73 buildings and 25 million square feet. The company's vice president states that their policy is to grant access to accommodate their tenants' needs, and that he is unaware of any instance which a tenant has been unable to get service from the provider of its choice. The company currently has eight local exchange carriers operating in its buildings, and it is in the process of adding a ninth. Well over half of the company's portfolio is served by at least one provider in addition to the ILEC, and, upon completion of pending negotiations, over 12% of the portfolio will be served by five providers, including the ILEC. The company has also unsuccessfully sought competitive providers for twenty-six properties that are served only by the ILEC. Declaration of Brent W. Bitz, attached as Exhibit I.

- Avalon Bay Communities, a large residential REIT, actively seeks competitive providers to serve its buildings and has introduced such providers in a number of its communities, despite disappointing experiences with several competitive providers in the past. *See* Lansdale Statement.

In sum, property owners are not blocking the growth of the CLEC industry and they are opening up their properties to competitive providers.

C. Building Owners Are Responding to Market Pressures By Adopting Different Strategies for Providing Access, and the Commission Should Not Interfere With This Process.

Today's property owners are as different from their predecessors of fifty years ago as are today's telecommunications companies. They do not simply put up four walls and a roof and then collect rent. The building development process amounts to the creation of a self-contained